

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

SEAN M. WOODWARD, et al.,

Plaintiffs,

12-CV-0373A(Sr)

v.

ENERGY CURTAILMENT SPECIALISTS, et al.,

Defendants.

DECISION AND ORDER

This case was referred to the undersigned by the Hon. Richard J. Arcara, pursuant to 28 U.S.C. § 636(b)(1), for all pretrial matters and to hear and report upon dispositive motions. Dkt. #9.

Plaintiffs commenced this action alleging discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the New York State Human Rights Law, N.Y. Exec. Law § 296 ("NYSHRL"). Dkt. #1.

Currently before the Court is defendants' motion to compel plaintiffs' responses to discovery demands; award defendants attorneys' fees for the costs of this motion; and extend the case management order to permit defendants to depose plaintiffs. Dkt. #24. In support of the motion, defendants' counsel declares that he served a first set of interrogatories and first request for production of documents upon plaintiffs on November 16, 2012, requested responses by letters dated January 24,

2013 and February 20, 2013 and advised plaintiffs' counsel by letter dated March 7, 2013 that defendants intended file a motion to compel if responses were not received by March 15, 2013, but had yet to receive discovery responses as of the filing of this motion on March 18, 2013. Dkt. #24.

In response, plaintiffs' counsel declares that she "was in the midst of preparing and planning to serve full and complete discovery responses" when defendants' counsel filed his motion to compel. Dkt. #29. Plaintiffs' responses were served on April 15, 2013. Dkt. #29. . Dkt. #29. Plaintiffs' counsel notes that she communicated her interest in resolving this matter by settlement while discovery demands were pending and complains that defendants' counsel never indicated that discovery responses were necessary to evaluate the prospect of settlement. Dkt. #29.

In reply, defendants' counsel declares that regardless of plaintiffs' interest in pursuing settlement, he clearly indicated his intention to file a motion to compel unless discovery responses were received March 15, 2013, which was four months after discovery demands had been served. Dkt. #34. Defendants' counsel also declares that plaintiffs' discovery demands are deficient and requests an opportunity to resolve the deficiencies with plaintiffs' counsel before seeking further Court review. Dkt. #34.

Rule 37(a)(5)(A) of the Federal Rules of Civil Procedure provides, in relevant part, as follows:

If the motion [to compel disclosure or discovery] is granted – or if the disclosure or requested discovery is provided after the motion was filed – the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both of them to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But, the court must not order this payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

As defendants' counsel filed this motion after good faith attempts to obtain responses to his discovery demands over the course of several months and as plaintiffs' counsel has failed to demonstrate substantial justification for her failure to provide timely responses to defendants' discovery demands, the Court finds an award of attorneys' fees is appropriate. If the parties are unable to agree to the amount of reasonable expenses incurred in the making of this motion, defendants' counsel shall submit an affirmation setting forth such costs no later than November 8, 2013.

SO ORDERED.

DATED: Buffalo, New York
October 3, 2013

s/ H. Kenneth Schroeder, Jr.
H. KENNETH SCHROEDER, JR.
United States Magistrate Judge